ASM Development Sdn Bhd v Hijjas Kasturi Associates Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1139 OF 2004
JAMES FOONG, ZALEHA ZAHARI AND HELILIAH JJCA
17 DECEMBER 2008

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Civil Procedure — Pleadings — Statement of claim — Application allowed — Appeal against order — Whether High Court judge erred in allowing application for amendment — Whether application to amend bona fide — Whether amendments likely to cause injustice or prejudice — Whether proposed amendments would introduce new cause of action — Rules of the High Court 1980 O 20 r 5 & O 18 r 10

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On 1 April 2003, Hijjas Kasturi Associates Sdn Bhd ('the plaintiff') commenced an action against ASM Development Sdn Bhd ('the defendant') for breach of contract. By way of this action the plaintiff sought to claim its professional fees for the Bandar Tasik Selatan project ('the project'). On 16 April 2003, the plaintiff filed an application to amend the original statement of claim dated 1 April 2003 on the grounds that its records were not complete when the original statement of claim was filed. According to the plaintiff because many of their documents and files were misplaced or could not be located, many relevant facts had not been pleaded in their original statement of claim and the proposed amendments to the statement of claim arose out of the documents produced by the defendant in the exchange of documents exercise. The plaintiff thus submitted that the application to amend was made bona fide and was not prejudicial to the defendant as the facts pleaded were within the defendant's knowledge. It also submitted that any prejudice could be compensated by costs and that the proposed amendments would not change the suit into one of different character. The defendant objected that the plaintiff was relying on its documents to move the application to amend and submitted that the plaintiff ought to have ascertained and located all of its documents before commencing proceedings against the defendant. The senior assistant registrar ('the SAR') allowed the plaintiff's application to amend. The defendant appealed to the High Court but the High Court dismissed this appeal with costs and hence the present appeal. The defendant argued that the High Court judge had erred in allowing the application for amendment. The defendant submitted that some of the proposed amendments would result in the introduction of a new cause of action of a claim in contract and the existing claim of quantum meruit as an alternative.

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Held, dismissing the appeal with costs:

(1) From the grounds of decision it was evident that the High Court judge

had examined carefully each and every one of the proposed amendments and was satisfied that they would not change the suit into one of a different character. The amendments sought were based on existing facts which were substantially the same facts as the original claim. Further, the plaintiff's explanation as to why it was unable to locate the files and documents that formed the basis of its proposed amendments were rightly accepted by the High Court judge as good reasons (see para 17).

(2) The High Court judge rightly found the defendant's submission that the plaintiff was introducing a new cause of action to be misconceived, as the plaintiff was merely seeking to introduce a new alternative remedy for damages for breach of contract and not a new cause of action (see para 21).

(3) It was found that the High Court judge had applied the correct principles and that there were no reasons for interfering with his exercise of his discretion. The amended statement clarified and elaborated the original grounds and instead of causing prejudice to the defendant was of benefit to the defendant. A plaintiff could put forward alternative remedies and needed to only make an election at the point of judgment (see para 22).

[Bahasa Malaysia summary

Pada 1 April 2003, Hijjas Kasturi Associates Sdn Bhd ('plaintif') memulakan tindakan terhadap ASM Development Sdn Bhd ('defendan') bagi kemungkiran kontrak. Melalui tindakan ini plaintif memohon untuk menuntut fi profesionalnya bagi projek Bandar Tasik Selatan ('projek'). Pada 16 April 2003, plaintif memfailkan permohonan untuk meminda penyataan tuntutan asal bertarikh 1 April 2003 atas alasan bahawa laporannya tidak lengkap apabila penyataan tuntutan asal difailkan. Menurut plaintif, oleh kerana banyak dokumen-dokumen dan fail-fail mereka disalahletak atau tidak dapat dicari, banyak fakta relevan tidak diplidkan dalam penyataan tuntutan asal mereka dan pemindaan yang dicadangkan kepada penyataan tuntutan berbangkit daripada dokumen-dokumen yang dikemukakan oleh defendan dalam penukaran dokumen yang dilaksanakan. Oleh itu, plaintif berhujah bahawa permohonan untuk meminda dibuat secara bona fide dan tidak prejudis kepada defendan memandangkan fakta-fakta yang diplidkan adalah dalam pengetahuan defendan. Ia juga berhujah bahawa apa-apa prejudis boleh diberi pampasan oleh kos dan pemindaan yang dicadangkan tidak akan menukar tindakan tersebut kepada satu ciri yang berbeza. Defendan membantah bahawa plaintif bergantung atas dokumen-dokumennya untuk membuat permohonan untuk meminda dan berhujah bahawa plaintif patut memastikan dan mencari kesemua dokumen-dokumennya sebelum memulakan prosiding-prosiding terhadap defendan. Penolong kanan pendaftar membenarkan permohonan untuk meminda plaintif. Defendan merayu ke Mahkamah Tinggi tetapi Mahkamah Tinggi menolak rayuan ini dengan kos dan maka rayuan ini. Defendan berhujah bahawa hakim

Mahkamah Tinggi terkhilaf dalam membenarkan permohonan untuk pemindaan. Defendan berhujah bahawa sebahagian daripada pindaan-pindaan yang dicadangkan akan mengakibatkan pengenalan kausa tindakan baru tuntutan dalam kontrak dan tuntutan quantum meruit yang sedia ada sebagai alternatif.

Diputuskan, menolak rayuan dengan kos:

(1) Daripada alasan-alasan keputusan, ia adalah jelas bahawa hakim Mahkamah Tinggi telah memeriksa dengan teliti setiap dan semua pemindaan-pemindaan yang dicadangkan dan berpuashati yang mereka tidak akan menukar tindakan kepada satu ciri yang berbeza. Pemindaan-pemindaan yang dipohon berdasarkan atas fakta-fakta yang wujud yang mana secara substansial fakta yang sama seperti tuntutan asal. Selanjutnya, penjelasan plaintif terhadap mengapa ia tidak dapat mencari fail-fail dan dokumen-dokumen yang membentuk asas pemindaan-pemindaan yang dicadangkannya adalah secara betul diterima oleh hakim Mahkamah Tinggi sebagai alasan-alasan bagus (lihat perenggan 17).

(2) Hakim Mahkamah Tinggi betul apabila mendapati hujahan defendan bahawa plaintif memperkenalkan kausa tindakan baru sebagai salah tanggap, kerana plaintif hanya memohon untuk memperkenalkan remedi alternatif baru untuk ganti rugi bagi kemungkiran kontrak dan bukan kausa tindakan baru (lihat perenggan 21).

(3) Ia didapati bahawa hakim Mahkamah Tinggi telah mengguna pakai prinsip-prinsip yang betul dan bahawa tidak terdapat alasan untuk campur tangan dengan pelaksanaan budi bicaranya. Penyata yang dipinda tersebut menjelaskan dan menghuraikan alasan asal dan tidak menyebabkan prejudis kepada defendan tetapi berfaedah kepada defendan. Plaintif boleh mengemukakan remedi-remedi alternatif dan perlu untuk hanya membuat pilihan pada poin penghakiman (lihat perenggan 22).]

Notes

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6160–6199.

Cases referred to

Bukit Waha Quarry Sdn Bhd v Teguh Permata Sdn Bhd [2000] 7 MLJ 396; [2000] 1 CLJ 781, HC (refd)

Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189, HL (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5(1), (2), (8), O 18 r 10(1), (2)

Appeal from: Civil Suit No S5–22–375 of 2003 (High Court, Kuala Lumpur)

RR Sethu (RR Sethu) for the appellant.

Tunku Alina Alias (Wong Lu Peen & Tunku Alina) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The plaintiff ('respondent') vide summons in chambers filed on 16 April 2003 sought an order to amend their statement of claim dated 1 April 2003 ('the original statement of claim') as well as to include an English version of it. The senior assistant registrar (SAR) allowed the plaintiff's application. On appeal to the judge in chambers, by order dated 12 October 2004, the High Court judge dismissed the defendant's ('appellant') appeal with costs and affirmed the SAR's decision.

[2] On 18 January 2007 we affirmed the High Court judge's decision and dismissed the defendant's appeal. Our reasons are as follows:

[3] The plaintiff's application to amend was made pursuant to O 20 r 5(1), (2) and (8) and O 18 r 10(1) and (2) of the Rules of the High Court 1980 ('the Rules'). In an application such as this it was incumbent upon the plaintiff to set out cogent reasons in their supporting affidavit for the court to exercise its discretion in their favour. The reasons advanced by the plaintiff which the High Court judge accepted warranting the exercise of the court's discretion in their favour were these.

[4] The plaintiff claimed that their records were not complete when the original statement of claim was filed on 1 April 2003. The subject matter of the suit, Bandar Tasik Selatan Phase 8 Project ('the project') had been abandoned in 1998. Most of their personnel who had handled the project had left them. Their documentation had also not been properly kept. Many of the documents and files were misplaced and could not be located.

[5] The plaintiff's solicitors averred that after the defendant served their bundle of documents, and upon perusal of the same, they sighted many relevant documents which documents they were unable to locate. They realised many relevant facts had not been pleaded in the original statement of claim. The plaintiff was of the view that the defendant would not be prejudiced as the need to move the amendments arose out of documents which had been in the defendant's possession at all times. The plaintiff was of the view the proposed amendments was not prejudicial to the defendant as the facts pleaded were within the defendant's knowledge. Any prejudice can be compensated by costs.

[6] The proposed amendments would not change the suit into one of a different character. The plaintiff's claim in the original statement of claim dated 1 April 2003 was for professional fees for the Bandar Tasik Selatan Phase 8 Project. The new alternative claim sought to be introduced remains that for professional fees for the same project. Both arises from the alleged breach by the defendant of the same contract.

[7] The application to amendment is made bona fide and filed at the earliest possible time. The factual position is that the defendant was unhappy as the plaintiff was relying on the defendant's documents in moving this application to amend.

[8] On the defendant's contention that the amendments were 'futile', the plaintiff's counsel argued that the defendant's counsel was confused between election of remedies and election of inconsistent rights. A plaintiff can put forward alternative remedies and need only make an election at the point of judgment.

[9] In the argument before us, the appellant's counsel submitted that the plaintiff ought to have ascertained and located all of their documents before commencing proceedings against the defendant. The plaintiff should have made a disclosure of documents in their affidavit verifying the list of documents. The breach of contract claim was included in the plaintiff's reply dated 11 July 2003 to the defence where express reference was made to a 'contractual relationship' and repudiation. According to the appellant's counsel the plaintiff lacks bona fides in claiming that they 'discovered' the claim in contract after the discovery process. The plaintiff had not in their supporting affidavit identified which of the documents in the defendant's list which jolted them from their slumber. He was of the view that the plaintiff's reliance on the defendant's list of documents was misplaced.

[10] The proposed amendment to paras 32 and 33 result in the introduction of a new cause of action of a claim in contract and the existing claim of quantum meruit as an alternative. The appellant submitted that the new cause of action for breach of contract is barred by limitation and does not arise out of the facts as pleaded. The breach of contract is founded on an alleged repudiation by letter dated 25 March 1988 that the plaintiff had accepted the repudiation. If one were to consider the date of the application (14 April 2004) more than six years had lapsed and limitation had accordingly set in.

[11] Whilst accepting that quantum meruit has often been interchangeably referred with 'quasi contract', the appellants' counsel argued that there is another special application of quantum meruit, that concerned with damages on a breach of contract. He was of the view that the consequence of the plaintiff's suit in quantum meruit instead of contract was an election to rely on a quasi contract and an abandonment of the claim in contract. He submitted that where a party is entitled to two inconsistent rights the choice of one is an abandonment of the other. Once that election is made and communicated (by the issue and the service of the original claim) the election has become final and irreversible. The defendant had expressly raised abandonment by election in the defence to which there was no answer.

[12] There is accordingly no basis for the exercise of the court's discretion in the respondents favour. The judge erred in allowing the application for amendment. The court was urged to allow the defendant's appeal with costs.

DECISION

[13] The principles on which courts exercise its discretion whether to allow or refuse an application to amend are well settled. An amendment would be allowed where the purpose of the amendment would result in the true issues between the parties to be determined. The amendments must not cause injustice to the other party/parties. There is no injustice to the other party if he can be compensated by appropriate orders as to costs (per Lord Brandon in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189 at p 212).

[14] It should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them. It is not the function of the court to punish parties for mistakes which have been made in the conduct of their cases by deciding otherwise that in accordance with their rights. However blameworthy may have been a party's failure to plead the subject matter of a proposed amendment, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party.

[15] Whether it would be unjust to grant leave to amend required a balancing of the applying party's need to amend and the prejudice to the opposing party's interest. 'Prejudice' in this context, is whether the defendant in this case will or may have difficulty in defending the claim, specifically at the trial. For any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the claim originally made, altered their position so as to make it more difficult to defend the new claim now made.

[16] The Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 held whether there would be injustice would depend on three questions being answered in the affirmative. The application was bona fide. Delay in making application is not bona fides. Any prejudice caused to the other side can be compensated by costs. The amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Bukit Waha Quarry Sdn Bhd v Teguh Permata Sdn Bhd* [2000] 7 MLJ 396; [2000] 1 CLJ 781).

[17] From the grounds of decision it is evident that the High Court judge had examined carefully each and every one of the proposed amendments. The judge was satisfied that the proposed amendments will not change the suit into one of a different character. The plaintiff's claim in the original statement of claim was for professional fees for the project, and the new alternative claim sought to be introduced remain that of professional fees for the same project and arises from the same contract. The amendments sought are based on existing facts which are substantially the same facts as the original claim.

[18] The learned judge accepted the explanation given by the plaintiff that the proposed amendments arose out of the documents produced by the defendant in the exchange of documents exercise. The defendant's documents filled up the missing pieces and the defendant would not be prejudiced as these documents had been in their possession at all times. On the allegation of delay, the judge held that a delay of about four months from the date of exchange of documents (early December 2003) to the date of filing of the application to amend was not inordinate. The plaintiff's explanation of many employees involved in the project and the fact that many had resigned since the abandonment of the project, and inability to locate the files and documents were good reasons why the proposed amendments could not be filed earlier.

[19] Upon examining the proposed amendments in detail the High Court judge was of the following view: the new paras 3 to 5 are facts referred to in brief in para 3.3 of the defence. The new para 7 is also a fact referred to in para 3.2 of the defence. The new para 10 refers to a fact that was previously mentioned in the original para 5 of the statement of claim, and also referred to in paras 6.4 and 6.7 of the defence. The new para 14 is referred to in paras 7.1 and 7.2 of the defence. The new paras 16, 17 and 18 contain facts referred to in paras 6.6 and 6.7 of the defence. The new para 19 is referred to in paras 21.2 and 21.3 of the defence. The new paras 22 to 27 are facts referred to in paras 12.1 and 12.2 of the defence. The amendments to paras 11 and 12 are for tidying up purposes.

[20] The proposed new paras 21, 22, 28 and 29 were relevant and has been pleaded in the statement of claim due to plaintiffs' lack of documentation and

records. Additionally, the new para 22 seeks to correct the position caused by a departure in pleadings in para 23 of the reply dated 11 June 2003.

[21] As to new paras 32 and 33 of the statement of claim, the defendant's objection that the amendments result in the introduction of a new cause of action would only apply to the amendments in paras 32 and 33, and not to the other amendments. He was of the view that the objection that the plaintiff is introducing a new cause of action is misconceived as the plaintiff was merely seeking to introduce a new alternative remedy for damages for breach of contract, not a new cause of action. His analysis was that the amendments which the plaintiff was seeking were based on existing facts which are substantially the same facts as the original claim.

[22] We are of the view the learned judge had applied the correct principles and agree with his views. We see no reason for interfering with the exercise of his discretion. We are in agreement that the plaintiff had produced sufficient, material and cogent reasons as set out in the supporting affidavits for the proposed amendments. The judge had not erred in accepting the explanation for the delay when allowing the proposed amendments. The proposed amendments clearly clarifies the relevant facts to enable the issues to be determined by the court and certainly material and relevant as a response to the defendant's statement of defence dated 11 June 2003. We agree they are not futile amendments. The amended statement clarified and elaborated the original grounds, and instead of causing prejudice to the defendants, were of benefit to the defendants. We are of the view that a plaintiff can put forward alternative remedies and need only make an election at point of judgment.

[23] For these reasons the High Court judge's decision dated 12 October 2004 was affirmed. The appeal is dismissed with costs. The deposit to the respondent to account of taxed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan